

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

KRISTOPHER MICHAEL ZIMMERMAN,

Petitioner,

vs.

ISIDRO BACA, et al.,

Respondents.

Case No. 3:15-cv-00454-HDM-WGC

**ORDER**

Before the court are the first amended petition for writ of habeas corpus (ECF No. 15), respondents' motion to dismiss (ECF No. 23), petitioner's opposition (ECF No. 29), and respondents' reply (ECF No. 30). The court is persuaded that ground 1 is not addressable in federal habeas corpus, and it grants the motion to dismiss in part on that issue alone.

In the state district court, petitioner was charged with one count of sexual assault. Petitioner's Ex. 7 (ECF No. 16-7). Petitioner moved to dismiss on three grounds. First, he argued that no court had jurisdiction over him because he committed the crime while he was a juvenile but was not identified and charged until after he had turned 21 and thus was outside of the juvenile court's jurisdiction. Second, he argued that the application of Nev. Rev. Stat. § 62B.330(3)(e)(2) was an ex post facto violation.<sup>1</sup> Third, he argued that the delay between identification of him as the assailant and the filing of charges was a due process violation. Petitioner's Ex. 10 (ECF No. 16-10).

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<sup>1</sup>Nev. Rev. Stat. § 62B.330(3)(e)(2) provides that a person who is 16 or 17, who commits a category A or B felony, which includes sexual assault, and who is not identified as the perpetrator until after he turns 21, is not within the jurisdiction of the juvenile court. Instead, that person is tried as an adult.

1 The state district court denied the motion to dismiss. Petitioner's Ex. 12 (ECF No. 16-12).  
2 Petitioner then agreed to plead guilty to attempted sexual assault. Petitioner's Ex. 15 (ECF No. 16-  
3 15). Petitioner, the prosecution, and the judge agreed that petitioner would be able to appeal the  
4 issues that were raised on direct appeal. Petitioner's Ex. 17 (ECF No. 16-17).

5 Petitioner, represented by different counsel, did appeal. He raised the first two issues,  
6 jurisdiction and ex post facto violation, but he did not raise the third issue, excessive delay before  
7 being charged.<sup>2</sup> Petitioner's Ex. 28 (ECF No. 17-7). Before briefing had concluded, the Nevada  
8 Supreme Court answered both of these questions in favor of the prosecution. State v. Barren, 279  
9 P.3d 182 (Nev. 2012). Petitioner tried to consolidate his appeal with a rehearing in Barren.  
10 Petitioner's Ex. 30 (ECF No. 17-9). The Nevada Supreme Court denied that request. Petitioner's  
11 Ex. 31 (ECF No. 17-10). Petitioner then argued in his own appeal that Barren was incorrect.  
12 Petitioner's Ex. 32 (ECF No. 17-11). The Nevada Supreme Court declined to revisit Barren and  
13 affirmed the judgment of conviction. Ex. 33 (ECF No. 17-12).

14 Petitioner then filed a post-conviction habeas corpus petition in the state district court.  
15 Petitioner's Ex. 36 (ECF No. 17-15). The state district court denied the petition. Petitioner's Ex. 42  
16 (ECF No. 17-21). Petitioner appealed, and the Nevada Supreme Court affirmed. Petitioner's Ex. 54  
17 (ECF No. 18-3).

18 Petitioner then commenced this action. The court appointed counsel, who filed the first  
19 amended petition. Respondents then filed their motion to dismiss.

20 Respondents first argue that ground 1 is not addressable in federal habeas corpus. Ground 1  
21 is a claim that the state court that presided over his case lacked jurisdiction. The Nevada Supreme  
22 Court found under state law that the state district court did have jurisdiction. Petitioner's Ex. 33, at  
23 1-3 (ECF No. 17-12, at 2-4). "Whether the court lacked jurisdiction is a matter of state law that has  
24 been resolved against [petitioner] in state court. This court is bound by a state court's interpretation  
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27 <sup>2</sup>Petitioner's ex post facto argument relied upon an assumption that the period of limitation  
28 for sexual assault already had expired. Petitioner assumed incorrectly. No period of limitation  
existed, let alone expired, because the victim filed a report with police during what would have been  
the period of limitation. See Nev. Rev. Stat. § 171.083(1).

1 of state law.” Jones v. Attorney General of California, 280 Fed. Appx. 646, 647 (9th Cir. 2008)  
2 (citing Hubbart v. Knapp, 379 F.3d 773, 779-80 (9th Cir. 2004)). Ground 1 is not addressable in  
3 federal habeas corpus.

4 Respondents next argue that petitioner has not exhausted his available state-court remedies  
5 for grounds 1 and 3. Before a federal court may consider a petition for a writ of habeas corpus, the  
6 petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a  
7 ground for relief, a petitioner must fairly present that ground to the state’s highest court, describing  
8 the operative facts and legal theory, and give that court the opportunity to address and resolve the  
9 ground. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (*per curiam*); Anderson v. Harless, 459  
10 U.S. 4, 6 (1982).

11 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state  
12 remedies only if he characterized the claims he raised in state proceedings specifically as federal  
13 claims. In short, the petitioner must have either referenced specific provisions of the federal  
14 constitution or statutes or cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir.  
15 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law that  
16 applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d 1153, 1158  
17 (9th Cir. 2003) (*en banc*). “The mere similarity between a claim of state and federal error is  
18 insufficient to establish exhaustion. Moreover, general appeals to broad constitutional principles,  
19 such as due process, equal protection, and the right to a fair trial, are insufficient to establish  
20 exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

21 The exhaustion of ground 1 is moot because the court has found that ground 1 is not  
22 addressable in federal habeas corpus, but ground 1 is exhausted. Petitioner did state on direct appeal  
23 that a prosecution where the state court lacks jurisdiction is a violation of the Fourteenth  
24 Amendment. Petitioner’s Ex. 28, at 9 (ECF No. 17-7, at 10).

25 Ground 3 is a claim that the five years between identification of petitioner as the assailant  
26 and arrest violates due process. This was one of the issues in petitioner’s motion to dismiss the  
27 charges against him. Petitioner’s Ex. 10, at 15-23 (ECF No. 16-10, at 16-24). Petitioner retained  
28 the ability to raise this issue on direct appeal, but he failed to do so. Petitioner raised the issue again

1 in ground 1 of the state post-conviction petition. Ex. 36, at 8-13 (ECF No. 17-15, at 9-14). In the  
 2 appeal from the denial of that petition, petitioner presented two issues. The headings were:

3 1. Trial and appellate counsel were ineffective for failing to move the court to dismiss  
 4 Mr. Zimmerman's case for an excessive pre-indictment delay in violation of Mr.  
 Zimmerman's 5th & 14th Amendments and Nevada constitutional rights.

5 2. Trial and appellate counsel were ineffective for failing to move the court to dismiss  
 6 Mr. Zimmerman's case for an excessive pre-indictment delay in violation of Mr.  
 Zimmerman's 5th & 14th Amendments and Nevada constitutional rights.

7 Ex. 47, at 7, 13 (ECF No. 17-26, at 8, 14). The headings were exactly the same. However, the  
 8 arguments were not. Issue 1 on appeal from the denial of the state post-conviction petition actually  
 9 was a constitutional claim that the pre-arrest delay was excessive. Despite the error in the heading,  
 10 petitioner did present to the Nevada Supreme Court and the Nevada Court of Appeals the issue that  
 11 he now presents in ground 3. Ground 3 is exhausted.

12 Next, respondents argue that petitioner's guilty plea has barred this court from considering  
 13 grounds 2, 3, and 4.

14 [A] guilty plea represents a break in the chain of events which has preceded it in the criminal  
 15 process. When a criminal defendant has solemnly admitted in open court that he is in fact  
 16 guilty of the offense with which he is charged, he may not thereafter raise independent  
 17 claims relating to the deprivation of constitutional rights that occurred prior to the entry of  
 the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea  
 by showing that the advice he received from counsel was not within the standards set forth in  
 [McMann v. Richardson, 397 U.S. 759 (1970)].

18 Tollett v. Henderson, 411 U.S. 258, 267 (1973). Ground 2 is a claim that the application of Nev.  
 19 Rev. Stat. § 62B.330(3)(e)(2) was an ex post facto violation. Ground 3 is a claim that the five years  
 20 between identification of petitioner as the assailant and arrest violates due process. Ground 4 is a  
 21 claim that appellate counsel provided ineffective assistance because he did not raise on appeal the  
 22 issue now alleged in ground 3. Grounds 2 and 3 are not barred by Henderson because the plea was  
 23 conditioned on petitioner being able to raise those issues on direct appeal. Petitioner then could  
 24 raise the claims in federal habeas corpus. Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975). See  
 25 also Jounigan v. Duffy, 552 F.2d 283 (9th Cir. 1977). Ground 4 is a claim of a constitutional  
 26 violation that occurred after petitioner entered his guilty plea. Henderson does not apply to this  
 27 claim.  
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1 Respondents have filed a motion for waiver of compliance with LR IA 10-3 (ECF No. 28).  
2 The court grants this motion.

3 Petitioner has filed a motion for leave to file surreply (ECF No. 31), and respondents have  
4 filed a motion for leave to file response to surreply (ECF No. 33). The proposed pleadings contain  
5 arguments that the court's rulings on grounds 2, 3, and 4 have made moot.


6 IT IS THEREFORE ORDERED that respondents' motion to dismiss (ECF No. 23) is  
7 **GRANTED** in part. Ground 1 is **DISMISSED** from this action.

8 IT IS FURTHER ORDERED that respondents' motion for waiver of compliance with LR IA  
9 10-3 (ECF No. 28) is **GRANTED**.

10 IT IS FURTHER ORDERED that petitioner's motion for leave to file surreply (ECF No. 31)  
11 and respondents' motion for leave to file response to surreply (ECF No. 33) are **DENIED** as moot.

12 IT IS FURTHER ORDERED that respondents shall have forty-five (45) days from the date  
13 of entry of this order to file and serve an answer, which shall comply with Rule 5 of the Rules  
14 Governing Section 2254 Cases in the United States District Courts. Petitioner shall have forty-five  
15 (45) days from the date on which the answer is served to file a reply.

16 DATED: July 25, 2017.

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HOWARD D. MCKIBBEN  
20 United States District Judge  
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